LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 13 1965
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

October Term, 1965

No. 745

Abraham Moskow, Jay L. Moskow, Harry Moskow and Myer Moskow,

Petitioners,

v.

Boston Redevelopment Authority, Christopher I. Lanzilla, George F. Foley, William J. Foley, Frederick C. Lawson, John J. Tierney, Jr., Barry Hynes, John E. Kerrigan, Peter F. Hines, and Katherine Craven, as they are Members and constitute the City Council of Boston, The Division of Urban and Industrial Renewal, John J. Carney, as he is the Temporary Director of the Division of Urban and Industrial Renewal, The City of Boston, New England Merchants National Bank of Boston, and Andrew A. Hunter,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Judicial Court of Massachusetts

BRIEF FOR BOSTON REDEVELOPMENT AUTHORITY IN OPPOSITION

John C. Conley
73 Tremont Street
Boston, Mass. 02108
Lawrence A. Sullivan
Foley, Hoag & Eliot
10 Post Office Square
Boston, Mass. 02109
Of Counsel

Lewis H. Weinstein
Loyd M. Starrett
Verrie W. Vance, Jr.
10 Post Office Square
Boston, Mass. 02109
Attorneys for Boston Redevelopment Authority

Rumford Press, Inc., Boston, Mass. — Law Printers

Table of Contents

	Page
Question Presented	2
Statement	3
Argument	
I. The question the Petition presents is not of practical significance.	7
A. The issue raised involves only Massachusetts procedure and will not recur even in Massachusetts.	7
B. The issue raised cannot result in a practical benefit even to petitioners in the present case.	8
II. In any event, the issue raised by the Petition does not merit the attention of this Court.	10
A. Prior decisions of the court below clearly established the relevant procedural rule.	10
B. Petitioners fully argued before the court below the question of what declaration should be entered upon the allegations of their bill.	12
Conclusion	13
Appendix A	A-1

Table of Citations

Cases

Berman v. *Parker*, 348 U.S. 26	7, 9
Bowker v. *Worcester*, 334 Mass. 422	9
County of Dukes County v. *New Bedford, etc., Steamship Authority*, 333 Mass. 405	10
Despatchers Cafe v. *Somerville Housing Authority*, 332 Mass. 259	9

Page

Foley v. *Springfield*, 328 Mass. 59 10
Papadinis v. *Somerville*, 331 Mass. 627 9
Stockus v. *Boston Housing Authority*, 304 Mass. 507 9
Trustees of Reservations v. *Stockbridge*, 1965 Mass. Adv. Sh. 265 10
Vasilakis v. *Haverhill*, 339 Mass. 97 10
Willcutt v. *Prescott*, 340 Mass. 532 ..... 5, 10, 11, 12
Worcester Knitting Realty Co. v. *Worcester Housing Authority*, 335 Mass. 19 9

In the

Supreme Court of the United States

OCTOBER TERM, 1965

No. 745

ABRAHAM MOSKOW, JAY I. MOSKOW, HARRY MOSKOW and MYER MOSKOW,

PETITIONERS,

v.

BOSTON REDEVELOPMENT AUTHORITY, CHRISTOPHER I. IANNELLA, GEORGE F. FOLEY, WILLIAM J. FOLEY, FREDERICK C. LANGONE, JOHN J. TIERNEY, JR., BARRY HYNES, JOHN E. KERRIGAN, PETER F. HINES, and KATHERINE CRAVEN, as they are Members and constitute the City Council of Boston, THE DIVISION OF URBAN AND INDUSTRIAL RENEWAL, JOHN J. CARNEY, as he is the Temporary Director of the Division of Urban and Industrial Renewal, THE CITY OF BOSTON, NEW ENGLAND MERCHANTS NATIONAL BANK OF BOSTON, and ANDREW A. HUNTER,

RESPONDENTS.

On Petition for a Writ of Certiorari to the Supreme Judicial Court of Massachusetts

BRIEF FOR BOSTON REDEVELOPMENT AUTHORITY IN OPPOSITION

Boston Redevelopment Authority, one of the respondents herein, respectfully submits the following in opposition to

the Petition for a Writ of Certiorari filed November 15, 1965:

Question Presented

The Petition raises no question as to the constitutionality of the Massachusetts procedural rule applied in the present case—that, when proof of all well-pleaded allegations of the bill would not entitle petitioners to the declaration requested but nevertheless those allegations do set forth a controversy within the Massachusetts declaratory judgment statute, technically the case should be disposed of not by sustaining demurrers (as the trial court had done initially in the present case) but rather by entry of a declaration adverse to petitioners. Indeed, no such question could be raised, for the Fourteenth Amendment certainly does not preclude a state court's assuming a party's allegations to be true and ruling against him if such a ruling is required as a matter of law upon those allegations assumed to be true. Thus basing a declaratory decree adverse to a plaintiff's contention on the plaintiff's own allegations is in substance no different than the sustaining of a demurrer in an ordinary case for coercive relief where the well-pleaded allegations of the complaint do not set forth a case for the relief prayed.

The sole question the Petition does present is whether petitioners' constitutional rights were somehow infringed because they had inadequate notice that this admittedly constitutional Massachusetts procedural rule might be applied to their case. (Pet. 8) [1]

---

[1] The Petition for a Writ of Certiorari and the Appendices thereto are cited herein, respectively, as Pet. and Pet. App. Certain materials which are not reproduced in any appendix to the Petition or in the appendix to this Brief are cited herein by reference to the printed Record ("R.") which was before the court below and is part of the certified record filed in this Court.

Statement

The Petition challenges the decision of the Supreme Judicial Court of Massachusetts with respect to one of five different proceedings brought by petitioners and their predecessor in title to certain property in Boston (an office building known and numbered as 10 State Street) wherein they challenge the inclusion of that property in the Government Center Urban Renewal Project of the Boston Redevelopment Authority (hereinafter sometimes referred to as, respectively, the "Project" and the "Authority"). The bill in equity which commenced the proceeding involved in the Petition was brought against respondents herein more than a year ago in the Superior Court of The Commonwealth of Massachusetts within and for Suffolk County. It prayed both a declaration that the taking by eminent domain of No. 10 State Street by the Authority for the Project was illegal and an injunction restraining the Authority from "evicting or otherwise interfering with the tenants . . . at 10 State Street" or demolishing the building there. (R. 10)

The basic allegation in the bill was that the taking of petitioners' property for the Government Center Urban Renewal Project was not for a public purpose but rather was for the purpose of enabling Cabot, Cabot & Forbes, a private developer, to construct a new building of which the principal tenant was to be the respondent New England Merchants National Bank of Boston (R. 2-4). The bill attacked the action of the City Council of Boston (R. 5-8) and of the Massachusetts Division of Urban Renewal (R. 9) in approving the Government Center Urban Renewal Project while it included petitioners' property and also attacked the activities of the respondent Hunter, who was alleged to have served as treasurer for a slate of candi-

dates for the Boston City Council who had pledged that, if elected, they would vote for the Government Center Urban Renewal Plan (R. 6-8).

Each of the respondents demurred to the bill (R. 11-12, 14, 16-17, 18-19, 21) without filing an answer; the grounds specified by the Authority's demurrer, in particular, included the facts that petitioners had "not alleged such a cause as entitles them to any relief in equity" against the Authority and, more generally, that the "Bill fails to set forth facts sufficient to warrant relief" to petitioners as well as that petitioners had "not stated in said Bill such a cause as entitles them to any relief against said defendant [the Authority] by way of declaratory decree." (R. 11-12) The Superior Court, after hearing, entered interlocutory decrees sustaining each of the demurrers (R. 13-14, 17, 20, 21) and a final decree dismissing the bill (R. 23). Petitioners thereafter appealed from all of those decrees (R. 13, 15, 18, 20, 22, 23), and all parties filed briefs on those appeals in the Supreme Judicial Court of Massachusetts. Petitioners' brief in that court, assuming the truth of all factual allegations of their bill, argued strenuously that those allegations established their contention that the taking of their property was invalid because the property was taken for private purposes and because important safeguards required by law were violated or omitted in connection with the taking. (See Appendix A *infra*, where the "Summary of Argument" of petitioners' brief in the Supreme Judicial Court is reproduced.)

On August 17, 1965, the Supreme Judicial Court handed down its opinion in which it upheld the decrees sustaining the demurrers of the respondent Bank and respondent Hunter, on the ground that the bill stated no controversy as to them, and held that the well-pleaded allegations of the bill set forth no basis for issuance of the declaratory

decree requested by petitioners. However, pursuant to the rule of Massachusetts practice applied in a number of prior cases (*e.g., Willcutt* v. *Prescott,* 340 Mass. 532), a declaratory decree adverse to the plaintiff rather than a decree sustaining the demurrer should be entered in a case where the defendant has demurred to a complaint for declaratory relief and the court concludes that, although the complaint sufficiently alleges a controversy within the declaratory judgment statute and thus is not technically demurrable, the well-pleaded allegations of the bill do not justify the declaration sought. Thus, the Court held, the proper disposition of the present case as to the other respondents was the entry of a declaration that the taking of the petitioners' property by the Authority was not illegal and was not a nullity. (Pet. App. 29)

There is no provision for rehearing by the Supreme Judicial Court of Massachusetts, but by custom one may request a rehearing informally by letter. On August 30, 1965, petitioners wrote to the Chief Justice of the Supreme Judicial Court requesting a rehearing with respect to whether such a declaration should be entered and arguing that petitioners had no opportunity to be heard on the question of what declaration should be entered. (Pet. App. 40-42) This request for rehearing was considered by the full Supreme Judicial Court and expressly denied on October 4, 1965. (Pet. App. 43)

Petitioners also applied to the court below for a stay of, among other things, the Authority's "taking any further steps to dismantle or demolish the building at 10 State Street"; that application was denied on September 17, 1965. Thereafter, petitioners sought a similar stay from this Court. The latter application was denied by Mr. Justice Clark on September 20, 1965 with the following endorsement: "Under Berman v. Parker, I see no merit in the contention. See 348 U.S. 26, 34-35."

Argument

Manifestly the question raised by the Petition is a narrow one which is limited to the interest of these particular petitioners in this particular litigation and presents no important question of federal law for resolution by this Court. Petitioners raise here only the issue whether, prior to the decision by the Massachusetts court in the present case, petitioners had sufficient notice of the Massachusetts procedural rule that, on a demurrer to a bill in equity for declaratory judgment, the issue is open whether or not the well-pleaded factual allegations of the bill would—if all proved—entitle the plaintiff therein to a declaration in its favor and that if the court resolves that issue in the negative it can enter a declaration adverse to the plaintiff.

Obviously that question is a rather technical matter of Massachusetts procedural law which has no general importance. And—even if the procedural rule in question had not been applied in earlier cases so that there might have been a lack of notice as petitioners allege—the issue presented by the Petition still would not have any future importance even in Massachusetts, for in any event the present case would give future litigants ample notice of that rule.

Moreover, petitioners' procedural objections are hollow; there is no substance behind them. Petitioners' request for declaratory relief is but one more in the long series of attacks upon the validity of urban renewal projects by persons who disagree with the Authority and the other responsible public agencies and seek to substitute their judgment for that of the Authority and such agencies. Because petitioners' bill in equity is based upon an aggregation of time-worn grounds which really do not differ substantially from those rejected by prior decisions of the Massachusetts

Supreme Judicial Court—the constitutional validity of which is unquestionable pursuant to the unanimous landmark decision of this Court in *Berman* v. *Parker,* 348 U.S. 26—it is clear that petitioners would be unable to obtain the declaration they seek even if they were "heard" time and time again.

Furthermore, it is difficult to believe that petitioners were surprised, because earlier Massachusetts cases in fact applied the procedural rule in question. Finally, even if petitioners were surprised, they were not prejudiced by any such surprise, for, as the Summary of Argument in petitioners' brief to the court below (reprinted in Appendix A, *infra)* indicates, petitioners in fact presented to that court at length their arguments in support of their contention that upon the facts they alleged they were entitled to a declaratory decree that the taking of their property by the Authority was invalid. In short, petitioners had—and took full advantage of—an opportunity to be heard with respect to the issue of what declaration should be entered upon the facts alleged in petitioners' bill in equity.

I. The question the Petition presents is not of practical significance.

A. *The issue raised involves only Massachusetts procedure and will not recur even in Massachusetts.*

Plainly the question presented by the Petition is a narrow one. Indeed, it appears to be relevant only to the procedural law of one state, for certainly declaratory judgment statutes and practices vary greatly from state to state—even among states where such statutes or practices exist—and the Petition does not demonstrate that the question petitioners seek to present to this Court has any relevance in any other state. Obviously it could have no

such relevance, for the question whether or not petitioners had sufficient notice of the particular procedural rule involved is purely a question of local Massachusetts law—in other words, whether the technical procedural rules applied in the present case were in accordance with Massachusetts law and precedent.

Moreover, a decision of the question raised by the Petition would not have any particular significance even for future litigants in Massachusetts. Regardless of what the procedural rule applied by earlier decisions may have been —even if were not true that, as is hereinafter demonstrated (see pages 10-12, *infra*), such decisions made clear the procedural rule applied in the present case—the decision in the present case unquestionably sets forth the relevant procedure clearly and unambiguously. For purposes of future litigation the decision in the present case will constitute ample notice of the applicable procedural rule.

B. *The issue raised cannot result in a practical benefit even to petitioners in the present case.*

Even if petitioners were given an additional opportunity to be "heard" — or even two or three such opportunities —they could gain no ultimate benefit, because the decisions of this Court and pertinent Massachusetts decisions with respect to the substantive law governing the urban renewal process clearly establish that even if petitioners could prove every factual allegation of their bill in equity they would not be entitled to the declaration they seek. Petitioners simply take issue with the decision of the Authority regarding the boundaries of the urban renewal project, question the motives of the Authority when it drew those boundaries, argue with the Authority's determination that the project area was substandard and decadent, and dispute the decisions, made by the several agencies charged by statute

with the responsibility for reviewing urban renewal plans, that the Government Center Urban Renewal Plan was sufficiently complete. The court below carefully considered all those matters and correctly concluded from an unbroken line of Massachusetts decisions that none of those matters is subject to judicial re-examination in the absence of specific factual allegations of fraud or bad faith, of which there were none in petitioners' bill in equity. See, *e.g.*, *Bowker* v. *Worcester,* 334 Mass. 422; *Stockus* v. *Boston Housing Authority,* 304 Mass. 507; *Worcester Knitting Realty Co.* v. *Worcester Housing Authority,* 335 Mass. 19; *Despatchers Cafe* v. *Somerville Housing Authority,* 332 Mass. 259; *Papadinis* v. *Somerville,* 331 Mass. 627.

The view of the law established by those Massachusetts decisions accords with the landmark decision of this Court in *Berman* v. *Parker,* 348 U.S. 26, in which this Court unanimously upheld the constitutionality of the taking of land for an urban renewal project in the District of Columbia against attacks similar to those in petitioners' bill in equity. It is significant that the present Petition in no way challenges the substance of the decision below; indeed, petitioners hasten to disclaim any disagreement with the principles laid down in *Berman* v. *Parker* (Pet. 11).

In these circumstances, the question presented by the Petition obviously is only a minor procedural matter and even if these petitioners could ultimately prevail on the merits as to that matter it would not be a meaningful victory. In other words, this is truly that rare case presenting an issue the resolution of which cannot be of practical value to anyone, even to the petitioners.

II. In any event, the issue raised by the Petition does not merit the attention of this Court.

A. *Prior decisions of the court below clearly established the relevant procedural rule.*

Petitioners' claim that their counsel had no notice of the relevant procedure and consequently they were deprived of "the opportunity to be heard" with respect to the question of "what declaration should be entered" (Pet. 9) ignores the teaching of prior decisions of the Massachusetts Supreme Judicial Court. Those decisions had made clear beyond any doubt that Massachusetts practice required entry of a declaratory decree adverse to the plaintiff in cases where defendant had demurred to a bill for declaratory relief and the court concluded that, although the petition sufficiently alleged a controversy within the declaratory judgment statute and thus was not technically demurrable, as a matter of law even if every well-pleaded allegation of the bill were proved the plaintiff would not be entitled to the declaration sought. See, e.g., *Foley* v. *Springfield,* 328 Mass. 59, 62-63; *Vasilakis* v. *Haverhill,* 339 Mass. 97, 101; *County of Dukes County* v. *New Bedford, etc., Steamship Authority,* 333 Mass. 405, 406; *Willcutt* v. *Prescott,* 340 Mass. 532; *Trustees of Reservations* v. *Stockbridge,* 1965 Mass. Adv. Sh. 265.

Petitioners attempt to distinguish those cases, in all of which the procedural rule involved in the present case was applied and consequently on demurrers to petitions for declaratory relief the demurrers were overruled and negative declarations were entered instead, by saying that they are all cases where the facts were not "in dispute". But those cases cannot be so distinguished, for patently when the plaintiff would not be entitled to relief even if all facts alleged by the plaintiff were proved there is no *material*

fact "in dispute". Moreover, at least in *Willcutt* v. *Prescott, supra,* the procedural posture was precisely the same as that in this case. In *Willcutt* as in the present case, the defendant had filed only a demurrer to a petition for declaratory judgment and nothing more and that demurrer had been sustained by the trial court. The Supreme Judicial Court ordered that the demurrer be overruled and a declaration adverse to the plaintiff be entered instead, holding as follows:

> "On the *asserted* facts the agreement and decree are in full force and effect and bar the examination asked by the plaintiffs to determine if error underlay them . . . . The decree which sustained the demurrers reflects the correct determination that no declaration in favor of the plaintiffs can be made on the *averments* of the plaintiffs. But we think it cannot be ruled as that decree necessarily does that the plaintiffs have failed to state a case presenting a controversy proper for determination under the declaratory procedure. The allegation of controversy is in general terms only but it is implicit that the parties are in issue in respect of the plaintiffs' contentions. This is therefore the usual case in which a declaratory decree should be made . . . . There are no facts in dispute and there is no occasion for a hearing. The decisive issue has been presented in full." 340 Mass. at 534-35. (Emphasis added.)

Inasmuch as the defendant in that case had filed no pleading other than a demurrer and there was no agreed statement of facts, the court's comment that there were "no facts in dispute" can only mean that no facts material for purposes of testing the sufficiency of the petition were disputed. That was so, of course, because on a defendant's demurrer the plaintiff's well-pleaded factual allegations

are always deemed to be admitted—as the court confirmed by using such phrases as "asserted facts" and the "averments of the plaintiffs".

In short, *Willcutt* v. *Prescott* was procedurally like the present case in every respect and constituted a clear precedent directly in point as to the procedural rule applied in the present case. There can be no question that the *Willcutt* case, in conjunction with the other cases hereinbefore cited, fairly put petitioners on notice that defendants' demurrer raised, among others, the issue whether a declaration adverse to plaintiffs should be entered on the basis of the allegations of plaintiffs' bill in equity.[2]

B. *Petitioners fully argued before the court below the question of what declaration should be entered upon the allegations of their bill.*

That petitioners were in fact aware that the question of what declaration should be entered was before the court below is manifest from their brief in that court.[3] In that brief petitioners argued far more than the question whether they had alleged a controversy as to which some declaration should be entered. Indeed, almost all of that brief is devoted to argument that the allegations of their bill entitled them to the specific declaration they requested—or, in the words of the first paragraph of petitioners' Summary of Argument, to their contentions, "first, that their property was taken for the private purposes of the Bank . . . and, second, that important safeguards required by law

---

[2] Moreover, the demurrers alleged that petitioners' bill in equity failed to state "such a cause as entitles them to any relief". (R. 11-12; see p. 4 *supra*) In other words, the demurrers in the present case expressly put in issue the question whether proof of all well-pleaded allegations of their bill in equity would entitle petitioners to the declaration requested.

[3] That argument is summarized—in petitioners' own words—in the Summary of Argument which was part of their brief to the court below and is reproduced as Appendix A *infra*.

were violated or omitted in connection with the taking." (p. A-1 *infra*) Thus petitioners' argument that they were not "heard" on the question of what declaration should be entered on the facts alleged by them is pure fancy. Petitioners have argued at great length that—upon the facts alleged in their bill—the urban renewal process was abused in the present case and the taking of their property in connection with that process was therefore invalid. Petitioners already were heard on the issue of what declaration should be entered, and their Petition to this Court is a transparent attempt to obtain not one but many days in court.

Conclusion

For the reasons stated, the Petition for writ of certiorari should be denied.

Respectfully submitted,

LEWIS H. WEINSTEIN
LOYD M. STARRETT
VERNE W. VANCE, JR.
10 Post Office Square
Boston, Massachusetts 02109

JOHN C. CONLEY
73 Tremont Street
Boston, Mass. 02108
General Counsel,
Boston Redevelopment Authority

Attorneys for
Boston Redevelopment Authority

LAWRENCE A. SULLIVAN
FOLEY, HOAG & ELIOT
10 Post Office Square
Boston, Massachusetts 02109
Of Counsel

December 13, 1965

Appendix A

The following is quoted from petitioners' Brief to the court below (pages 10-13):

"SUMMARY OF ARGUMENT

"The appellants in these cases challenge, not the urban renewal process, but an abuse of the urban renewal process. Their contention is, first, that their property was taken for the private purposes of the Bank (pp. 14-21); and, second, that important safeguards required by law were violated or omitted in connection with the taking. (Pp. 42-52.)

"We deal at the outset with the substantive principle that private property cannot be taken by eminent domain for a dominantly private purpose. (P. 14.) Often there is difficulty in framing a comprehensive definition of public purpose, but we show that problems involved in questions of excess condemnation or mingled public and private uses are magnified and aggravated by the urban renewal program. (Pp. 15-17.)

"The issue specifically is whether 10 State Street could be included in the Government Center project area solely for the benefit of the Bank and CC&F. (P. 19.) While BRA concededly has discretion in site selection, canalized within the statutory context, yet the circumstances here alleged, where the Bank attempted to buy 10 State Street for itself pursuant to its understanding with BRA, failed, and now is the beneficiary of the taking pursuant to the understanding, are an abuse of that discretion. (Pp. 18-19.)

"Closely entwined with substantive principles in the field of municipal jurisprudence are problems of reviewability. (Pp. 21-28.) The appellants see no reason in the public interest for the Courts to foreclose inquiry on the issue of the purpose of a taking. Compare *Village on the Hill,*

[Appendix A: "Summary of Argument" quoted from petitioners' Brief to the court below]

Inc. v. *Massachusetts Turnpike Authority,* 1964 Advance Sheets 1245. (Pp. 21-26.)

"We advance what we believe are cogent reasons for courts to be particularly careful in the situation of urban renewal (pp. 21-22), and we note cases, one in Connecticut and another in Kansas, where similar problems have been examined by courts in the urban renewal field. (P. 24 and p. 27.)

"As to specific review procedures, aside from the omnibus bill, which is partly covered by what has already been said, there are two petitions for certiorari—Nos. 593464 and 594464—one bill in equity raising issues under G. L. c. 268A, and one petition for review against the Division under G. L. c. 30A.

"In general as to both of the certiorari petitions, we argue that the proceedings sought to be reviewed include questions of purpose and compliance with statutory requirements and are judicial in nature. (Pp. 28-31.) As to both the Council and the Division, the administrative function is approval, not the actual delineation of the project area, and approval implies a judicial function. (P. 30.) This Court has already observed, as we understand its language, that substantially similar urban renewal proceedings are reviewable by certiorari. (P. 31.)

"The demurrer in No. 593464 is based on exhaustion of remedies. The short answer to this is that there are no other remedies that could be exhausted where the precise issues raised by No. 593464 relative to the Council could be raised before another governmental or administrative tribunal. (Pp. 34-35.) The recent NASA case, where the Cambridge redevelopment project is still in the study stage, is not authority to the contrary. (P. 35.)

[Appendix A: "Summary of Argument" quoted from petitioners' Brief to the court below]

"The exhaustion doctrine, significantly, is not invoked in No. 82572 Equity, which also seeks to review the qualification or disqualification of three members of the Council. To the argument that is made, that G. L. c. 268A does not authorize the suit to be brought, the appellants respond that the provisions of section 21(a) of that chapter and consideration of public policy support maintenance of the bill. (Pp. 37-38.)

"There are two proceedings against the Division because of the ambiguity of the provisions for a public hearing in G. L. c. 121, sec. 26KK. If this section does not apply—in other words, if the plan is an urban renewal plan subject solely to the procedures of section 26ZZ of that chapter—certiorari is an appropriate remedy in view of the provision for approval by the Division and the existence of certain statutory prerequisites. (Pp. 38-39.) On the other hand, if section 26KK does apply, then the proceeding is adjudicatory under G. L. c. 30A. (P. 40.) Applicability of section 26KK is suggested by the fact that the Division held a hearing required only by that section, and by the literal applicability of the statutory provision. (P. 40.)

"In the proceedings against the Council, as well as in the omnibus bill, disqualification of certain Council members invalidates the 1964 vote. Three members of the Council, by pledging themselves to vote to include Parcel 8, without hearing the evidence, tended to reduce the public hearing before the Council to an empty form. (Pp. 43-44.) Another irregularity was that Langone's vote, essential to the five-four vote of 1964, was affected by the financial interest of his immediate family in a funeral home in the project area. This interest, and certain contributions received by two other members of the Council, violated the spirit and letter of G. L. c. 268A. (P. 45.) A final reason

[Appendix A: "Summary of Argument" quoted from petitioners' Brief to the court below]

to set aside the Council's 1964 vote is that the Council was bound to respect its determination in 1963 not to include Parcel 8. Various guidelines determine the applicability of administrative *res judicata*, and the present case should be within those guidelines. (Pp. 47-49.)

"Lastly, the taking is conditioned upon the existence of a valid urban renewal program. There are three respects in which the present plan violates section 26ZZ of G. L. c. 121. First, a "general plan for the municipality as a whole" does not exist in Boston. (Pp. 50-51.) Second, necessary zoning changes are not shown on the plan. (P. 51.) And, third, the plan fails to conform to a comprehensive plan for the locality. (P. 52.)

"The first four suits are not moot by virtue of the assignment by State Street to its stockholders. (P. 52.) We assume that the Justice of the Superior Court who sustained the demurrers saw no reason in his discretion to allow the subsequent amendments in these suits relative to parties, since they would not have cured any deficiency upon which the demurrers were claimed to be based. To the extent that the first four proceedings are properly brought, we suggest that the orders denying the addition of parties and amendment for that purpose be vacated, and those cases be remanded."